No. 87-615

IN THE

Supreme Court of the United States

October Term, 1987

MELISSA DETSEL, an infant by her Mother and next friend, MARY JO DETSEL,

Petitioner,

vs.

BOARD OF EDUCATION OF THE AUBURN ENLARGED CITY SCHOOL DISTRICT, PETER KACHRIS, individually and as Superintendent of the Auburn Enlarged City School District, GORDON AMBACH, Commissioner of the New York State Education Department,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Question Presented

Did the Court of Appeals for the Second Circuit err in concluding that the Education of the Handicapped Act does not impose upon boards of education the obligation to provide one-to-one full-time skilled nursing services to a child with a handicapping condition who requires such services during the school day?

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Respondent Commissioner of the New York State Education Department respectfully requests that this court deny the petition for a writ of certiorari, seeking review of the opinion of the United States Court of Appeals for the Second Circuit in this case. That opinion is reported at 820 F2d 587 (1987).

Statement of the Case

This is an action commenced in the United States District Court for the Northern District of New York pursuant to the Education of the Handicapped Act (EHA), 20 USC §§1400 *et seq.*, in which petitioner seeks to set aside a decision of respondent New York State Commissioner of Education rendered pursuant to 20 USC §1415(c) and holding that respondent Board of Education of the Auburn Enlarged City School District was not obligated by the EHA to provide skilled nursing services to the infant petitioner during the time each school day when she attends an instructional program provided by the board of education.

Melissa Detsel is a nine year old girl with numerous health problems, including diaphragmatic hernia and hypoplastic right lung, patent ductus arteriosis, pulmonary hypertension, border-line congestive heart failure, pulmonary fibrosis with ventilator dependency, scoliosis, club feet, abnormal functioning of the gastro-intestinal system caused by a gastro-esophageal reflux and undernutrition. She is fed and receives medication through a gastrostomy, and she requires one-to-one attention by a registered or licensed practical nurse who is specially trained in respiratory care management.

In July 1983, she was referred to the committee on the handicapped (COH) of respondent board of education, which has the responsibility of recommending to the board of education an appropriate educational placement for each handicapped child of school age residing within the district, pursuant to New York State Education Law §4402(1)(b)(3). The COH identified Melissa as "other health impaired" and recommended placement in an Option III class operated by a board of cooperative educational services (BOCES) at defendant board's

Seward School in Auburn. The COH recommended that Melissa receive speech/language therapy, physical therapy, occupational therapy, adaptive physical education and appropriate, but unspecified, school health support services.

Respondent board of education approved the COH recommendation, and Melissa attended kindergarten in the Option III program for two hours each morning during the 1983-84 school year. The Cayuga County Department of Social Services, which had provided the services of one nurse from 7:00 a.m. until 3:00 p.m. and of a second nurse from 11:00 p.m. until 7:00 a.m., declined to pay for the services of the first nurse who accompanied Melissa to school, allegedly because the regulations governing the Medicaid program precluded that agency from paying for the nurse's services while the child was in school. Respondent board asserted that it was not responsible for payment of the nurse's salary, but agreed to pay for such services while the board and Mary Jo Detsel, Melissa's mother, ascertained whether other sources of payment were available.

An annual review of Melissa's program was conducted by the COH on May 9, 1984, and the COH recommended that her handicapping condition be changed to "multiply handicapped," but that she continue to attend the BOCES Option III class with speech, physical and occupational therapies during the 1984-85 school year. The Phase I individualized education plan embodying the COH recommendation indicated that appropriate school health services were to be provided, but did not identify specific services.

Upon notification from the district that it would not pay for the child's nursing services, Mary Jo Detsel requested an impartial hearing in accordance with the provisions of 20 USC §1415(b)(2) and its State counterpart, Education Law §4404(1). The district agreed to pay for the child's nursing services in the interim.

In a decision dated December 14, 1984, the hearing officer found that the nursing services were "supportive services" inextricably related to Melissa's opportunity to receive an education in the least restrictive environment, and concluded that respondent board of education was obligated to provide such services as a component of the student's right to a free appropriate public education secured by the Education of the Handicapped Act.

The board of education sought review of the hearing officer's decision in an appeal to respondent New York State Commissioner of Education. By decision dated February 25, 1985, the Commissioner annulled the decision of the hearing officer, and directed that the COH immediately make provision for home instruction for Melissa while petitioner sought administrative review of the refusal of the Cayuga County Department of Social Services to pay for Melissa's nursing services while she attends school.

This action was commenced against respondent board of education and respondent Kachris. Respondent Ambach, who left office as Commissioner of Education of the State of New York on June 30, 1987, was added as a defendant to this action by service of an amended complaint in May, 1985. Respondent board's motion for permission to serve a third party complaint upon Cesar A. Perales, New York State Commissioner of Social

Services, was denied by the District Court on September 24, 1985. On June 19, 1986, the District Court granted defendants' motion for summary judgment, dismissing the complaint in its entirety, upon a finding that the EHA does not require respondent board of education to provide petitioner with the constant nursing care which she requires while she is in attendance at school.

In a *per curiam* decision dated June 12, 1987, the United States Court of Appeals for the Second Circuit dismissed petitioner's appeal from the judgment of the District Court, finding that the District Court had given proper effect to the statutory scheme in balancing the interests of the parties.

REASONS FOR DENYING THE WRIT

The decision below is consistent with the EHA, with the decisions of this Court and with the decisions of other circuits, and provides useful and appropriate criteria upon which to determine a child's eligibility for related services.

A. The applicable provisions of the EHA do not require the provision of skilled nursing services.

Petitioner asserts that this case presents an important issue as to the construction of a Federal statute and is therefore appropriate for review by this Court. Although petitioner attempts to support this assertion by characterizing the Second Circuit's decision as "novel" or at variance with decisions by this Court or other Circuit Courts of Appeals, we respectfully submit that the District Court and the Second Circuit did nothing more than apply the provisions of the EHA to the specific facts in this case.

The EHA requires that each child with a handicapping condition receive a "free appropriate public education" (20 USC §1412 [1] and [2][B]), which must include special education and related services (20 USC §1401[a][18]).

> "The term 'related services' means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children." 20 USC §1401(a)(17).

Although the definition of related services is fairly expansive, it is qualified by the general requirement that a particular service must be necessary to assist a child to benefit from instruction, and by the very specific limitation upon the provision of medical services by a board of education. Medical services need only to be provided for the purpose of diagnosis and evaluation, which in the context of the statute clearly refers to ascertaining the nature and extent of a handicapping condition which impacts upon a student's ability to learn. It was never intended that boards of education should generally assume the responsibility of parents and/or other public agencies for the treatment and maintenance of individuals afflicted with various medical conditions, as the statute clearly reveals.

Petitioner correctly points out the clear preference expressed in the EHA for a special education placement in the least restrictive environment appropriate to address the individual needs of a child with a handicapping condition (20 USC §§1412[5][B] and 1414[a][1][C][iv]). That preference does not, however, require that any and all services which would enable a child to attend instruction in a less restrictive environment be provided by a board of education; boards are required to provide only those services which fall within the definitions of "special education" and "related services."

The Federal regulation defining "related services," 34 CFR §300.13, also indicates that the term includes "medical services for diagnostic or evaluation purposes" (34 CFR §300.13[a]), and defines medical services as "services provided by a licensed physician to determine a child's medically related handicapping condition which results in the child's need for special education and

related services" (34 CFR §300.13[b][4]). The regulation further provides that "related services" also include "school health services, social work service in schools, and parent counseling and training" (34 CFR §300.13[a]). "School health services" are defined as "services provided by a qualified school nurse or other qualified person" (34 CFR §300.13[b][10]).

Respondent Commissioner of Education submits that the nursing service involved in this case is not a related service, and need not be provided by respondent board of education as part of a free appropriate public education. The definition of "related services" in the EHA is structured in such a way that it includes "medical services" insofar as those services are for diagnosis and evaluation. Because the regulations implementing the EHA place upon the definition of "medical services" the further gloss of limiting such services to those provided by a licensed physician, petitioner argues that any health care service which is provided by an individual other than a physician must be provided by a board of education so long as it enables a child with a handicapping condition to attend school.

Petitioner's argument skips a vital step. All parties agree that the skilled nursing services required by Melissa do not constitute diagnostic or evaluative medical services which must be provided under the EHA. To qualify as related services, it is still necessary, however, to identify a specific category of related services within which the skilled nursing services fall. Looking to the applicable statutory (20 USC §1401[a][17]) and regulatory [34 CFR §300.13] provisions, the regulatory category of "school health services" (34 CFR §300.13[a] and [b][10]) appears to be the category closest to including the services required by Melissa. However,

"school health services" are defined as "services provided by a qualified school nurse or other qualified person" (34 CFR §300.13[b][10]). As discussed below, the specialized skilled nursing services required by Melissa are well beyond the expertise of a school nurse or other school personnel. Thus it appears that the nursing services required by Melissa do not fall within any of the categories of services specifically required to be provided under the EHA and its implementing regulations.

B. The decision below is entirely consistent with the analysis applied by this Court in *Tatro*.

In *Irving Independent School District v. Tatro*, 468 US 883 (1984), this Court construed the aforementioned statutory and regulatory provisions in holding that a board of education was obligated to provide the procedure of clear intermittent catheterization (CIC). The Court concluded that a simple procedure like CIC, which can be performed in a few minutes by a lay person with less than an hour's training, was not a medical service because it need not be performed by a licensed physician. As noted by the District Court in reasoning adopted by the Court of Appeals, the instant case is factually different from and the result herein consistent with the *Tatro* decision (*Detsel v. Board of Education*, 637 F Supp 1022 [N.D.N.Y. 1986], at 1026-1027 [pp. 11a-12a of the appendix to the petition herein]).

In upholding the authority of the U.S. Secretary of Education to require boards of education to provide appropriate school health services, this Court noted that school nurses have long been a part of the educational system, and found that the Secretary could reasonably conclude that school nursing services are not the sort of burden that Congress intended to exclude as "medical

services" in the statutory definition of related services. Implicit in the Court's reasoning is a belief that an occasional, simple health procedure such as CIC is no different in occurrence or scope than the services which are typically provided in a school health program, *e.g.* taking temperatures, treating minor cuts and bruises, taking health histories, administering simple eye tests. The Court specifically noted that,

> "Nurses in petitioner School District are authorized to dispense oral medications and administer emergency injections in accordance with a physician's prescription. This kind of service for nonhandicapped children is difficult to distinguish from the provisions of CIC to the handicapped. It would be strange indeed if Congress, in attempting to extend special services to handicapped children, were unwilling to guarantee them services of a kind that are routinely provided to the nonhandicapped." *Tatro, supra* at 893-894.

Melissa however requires health services which are neither routine nor infrequent. During the time that she is in school, the nurse (1) checks her vital signs—temperature and respiration rate, (2) administers medication through a tube to the girl's jejunum, (3) administers a "P.D. and C.", which involves having the girl ingest 2 c.c.'s of saline solution into her lungs, striking her very hard around the lungs for 2 minutes on each side to loosen the mucus in her lungs, and suctioning the mucus from her lungs. The nurse must also be prepared at all times to administer a special form of cardiopulmonary resuscitation, because of the tracheostomy, and Melissa's attendant must have had experience treating respiratory disease. When the child becomes frightened or upset she may become cyanotic, *i.e.* turn blue, in which case immediate treatment is required in order to save her life.

Melissa's health needs require attention by a registered or licensed practical nurse who is specially trained in respiratory care management, and having a school nurse on call to respond to Melissa's respiratory distress would not be adequate. The services she requires are clearly therapeutic in nature, involving treatment for a life threatening condition, and are not simply for purposes of diagnosis and evaluation. It was conceded by petitioner that the health services required by Melissa cannot be provided by a regular school nurse.

In essence, Melissa requires sophisticated therapeutic care on a constant basis. Although the Federal regulation defines medical care in terms of services which must be performed by a licensed physician, respondent Commissioner believes that it is overly simplistic to classify a particular service as either "related" or not "related" solely by reference to the professional license required by individual states to perform that service, and it is submitted that this Court established no such test in *Tatro.*

Instead of focusing simply on the professional license held by the person providing a particular service, this Court in *Tatro* clearly considered the nature of the service in the context of the kinds of health services which educational institutions have traditionally provided (*Irving Independent School District v. Tatro, supra* at pp. 893-894). As this Court noted in *Board of Education, Hendrick Hudson School District v. Rowley,* 458 US 176 at 190, Congress did not intend to impose upon states "a burden of unspecified proportions and weight[;]" rather the EHA was enacted to increase Federal funding to assist states in meeting the goal of providing full educational opportunities for handicapped children. Congress devoted little discussion to the

medical services exception to the statutory definition of related services. Absent explicit evidence to the contrary, it is logical to conclude that Congress did not intend that school districts should assume financial responsibility for the provision of medical services which have heretofore been the responsibility of parents and other public agencies.

In *Tatro*, this Court concluded that the EHA provided the Secretary of Education with the authority to require local educational agencies to provide school health services, and that, in the circumstances presented, CIC constituted such a service. The Court did not require local educational agencies to provide any and all services which could be provided by a health practitioner other than a doctor. We respectfully submit that the extensive therapeutic services required by Melissa Detsel are not school health services, and that nothing in this Court's decision in *Tatro* requires or supports a contrary conclusion.

C. The decision below is consistent with both the decision of the Ninth Circuit Court of Appeals and the reasoning followed therein.

Petitioner seeks to oversimplify the analysis used by the U.S. Court of Appeals for the Ninth Circuit in *Department of Education v. Katherine D.*, 727 F2d 809 (9th Cir. 1984), affg in part 531 F Supp 517, cert den 471 US 1117 (1985), for the purpose of establishing an alleged conflict between the holding in that decision and the holding of the Second Circuit in this case. Although there are similarities between the facts of that case and the case now before the Court, there are also significant factual differences. Clearly the most significant factual differences are that the services required by *Katherine D.*

could be performed by a lay person (*supra*, 727 F2d 809, footnote 6 at 815; 531 F Supp 517, at 526), rather than the health professionals which Melissa requires, and that Katherine did not require a full-time attendant whose sole function was to monitor her condition and treat her as necessary. Thus, the services required by *Katherine D.* could be characterized as school health services which could be performed on an incidental basis by regular school staff. In contrast, the services required by Melissa are not school health services and cannot be performed by regular school staff.

Moreover, the Ninth Circuit simply did not use the "bright line" test ascribed to it by petitioner. To the contrary, that Court, at page 813, specifically recognized the balancing of concerns that is inherent in the EHA by requiring the Hawaii Department of Education

> "to make only those efforts to accommodate Katherine's needs that are 'within reason'. *Tokarcik v. Forest Hills School District*, 665 F2d 443, 455 (3d Cir. 1981), cert den 458 US 1121 (1982)."

The Ninth Circuit further noted in reaching its decision that the services required by Katherine "could have been made available without unduly burdening the school system" (*supra*, at 815). Thus, it appears that the Ninth Circuit recognized that the balancing of certain interests is necessary in determining the obligation of a local educational agency to provide a particular service, and more specifically in determining whether a particular service comes within the regulatory definition of a "school health service."

D. The analysis used by the Court below will not result in either inconsistent results or protracted litigation.

Petitioner argues that the analysis used by the Court of Appeals for the Second Circuit in this case will lead to inconsistent results and to protracted litigation. In the first place, it must be noted that petitioner has made no showing that either is likely to occur. Furthermore, we submit that consistency of results should not take precedence over the proper and intended implementation of the EHA.

Furthermore, with respect to petitioner's claim that inconsistent determinations will result from an examination of the nature of services required by a child, it does not appear that any such inconsistency has actually occurred. In cases involving intermittent routine care which could be performed by a regular school nurse, the courts have concluded that such services are school health services which must be provided under the EHA (*Irving Independent School District v. Tatro, supra; Department of Education v. Katherine D., supra; Tokarcik v. Forest Hills School District,* 665 F2d 443 [3d Cir. 1981], cert den 458 U.S. 1121 [1981]). On the other hand, when "private duty" nursing services are required to serve the extensive medical needs of a student, the courts have concluded that such services are not school health services and need not be provided by local educational agencies (*Detsel v. Board of Education,* 820 F2d 587 [2d Cir. 1987], affg 637 F Supp 1022 [NDNY 1986]; *Bevin H. v. Wright,* 666 F Supp 71 [W.D.Pa. 1987]). Although it may not always be easy to determine whether the services required by a particular child are school health services, the resolution of that issue is not so difficult that it is outside the range of expertise of the local and State education officials charged with making such determinations or of judges in reviewing those determinations.

Accordingly, we submit that the decision of the Court below is not likely to lead to inconsistent results or protracted litigation in the future.

Conclusion

For the foregoing reasons, respondent Commissioner of Education of the State of New York respectfully requests that the petition for the writ of certiorari be denied.

Dated: Albany, New York
November 6, 1987

Respectfully submitted,

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